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No. 85-1748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE SECONDARY LEAD SMELTERS ASSOCIATION, INC.,
and
GULF COAST LEAD COMPANY, INC.
Petitioners,

v.

WILLIAM D. RUCKELSHAUS, *et al.*,
Respondents.

BRIEF OF AMICUS CURIAE LEATHER INDUSTRIES OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I. INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE LEATHER INDUSTRIES OF AMERICA

Amicus Curiae Leather Industries of America ("LIA") respectfully submits this brief in support of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit that the Secondary Lead Smelters Association, Inc. and Gulf Coast Lead Company, Inc. filed in this proceeding on April 24, 1986. The petitioned writ of certiorari should be granted for the following reasons.

LIA is a trade association whose members are tanners of leather and manufacturers of leather goods. At present, LIA's members produce approximately ninety percent of the leather in the United States.

Because LIA's members are subject to effluent limitations guidelines promulgated under the same statutory authority as the ones challenged in the proceeding below,

LIA has a substantial interest in the judicial review and notice and comment issues this case raises. Section 301 of the Clean Water Act, 33 U.S.C. § 1311, requires the U.S. Environmental Protection Agency ("EPA") at least every five years, to review the effluent limitations guidelines applicable to the leather tanning and finishing industry and to revise them when necessary. Because section 301 subjects the industry to periodic rulemaking by EPA, the industry has an important interest in ensuring both that EPA conducts its rulemaking proceedings properly, and that federal appellate courts responsibly review these proceedings pursuant to the judicial review provisions of the Clean Water Act, 33 U.S.C. § 1369, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.

II. STATEMENT OF THE CASE

LIA incorporates herein by reference the Statement of the Case set forth in the Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

III. SUMMARY OF ARGUMENT

In the proceeding below, the United States Court of Appeals for the Fourth Circuit did not satisfy its judicial review responsibilities under the Clean Water Act and the Administrative Procedure Act to meaningfully review the rulemaking proceedings of the EPA. The court failed to examine the Agency's record of rulemaking with any degree of scrutiny, and instead approved the Agency's decision on the ground that it was not arbitrary or capricious. The lack of meaningful review threatens the integrity of future EPA rulemakings.

In the proceeding below, the parties objected to what amounts to a breakdown in compliance with the notice and comment requirements of the APA. In selecting the empirical data upon which it based certain effluent limitation

guidelines, EPA ignored relevant data submitted by the industry and relied upon data about which the industry was denied an opportunity to comment. The court below failed entirely to address this glaring procedural defect.

The failure of the Fourth Circuit Court of Appeals to correct the patent errors of the EPA in the proceeding below would create an intolerable precedent. The complexity of EPA rulemaking proceedings will increase, rather than diminish, in the future as the Agency considers expanding volumes of technical data in promulgating effluent limitation guidelines. This Court should not allow the federal appellate courts to approve EPA rulemaking proceedings that do not comply with notice and comment requirements, merely because the underlying data at issue is voluminous and results in a difficult review process.

IV. ARGUMENT

1. The Writ Should Issue to Correct Serious Failures in the Fourth Circuit's Analysis of EPA Rulemaking

The Fourth Circuit failed to review the rulemaking record of the EPA with anything resembling the care and scrutiny that the judicial review provisions of the Clean Water Act and the APA require. In the proceeding below, the Fourth Circuit merely acknowledged conflicts in the evidence, and totally deferred to every Agency decision with the conclusion that it was not arbitrary, capricious or an abuse of discretion. This Court should not allow the judicial review provisions of the Clean Water Act and the APA to be rendered so devoid of meaning.

As set forth in the instant Petition for Writ of Certiorari ("Petition"), the court failed to properly review the EPA's record of rulemaking. Petition at 14–17. This Court consistently has recognized that a reviewing court must give the rulemaking record of a federal agency careful attention, and must ensure that the agency's determinations are grounded soundly in the underlying record. The Court

recently emphasized this point in *Bowen, Secretary of Health & Human Services v. American Hospital Association*, No. 84-1529 (June 9, 1986). *See, Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), counseling "a thorough, probing, in-depth review"; *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), a court must make a "searching and careful" review of the agency's rulemaking; *Frisby v. United States Department of Housing & Urban Development*, 755 F.2d 1052, 1055 (3rd Cir. 1985), a reviewing court must take "a probing, 'hard look' at the agency's action."

In this case, the Fourth Circuit simply failed to afford the degree of scrutiny that the foregoing decisions require. As set forth in the Petition, the court's review was inadequate in several respects. First, the court *ignored the parties' principal argument* that EPA wrongfully distorted the data upon which it based its lead concentration limits, and improperly disregarded data submitted by the industry. The court accordingly validated lead concentration limits that were based upon erroneous data and are technically infeasible. Petition at 11-12.

Second, the court also overlooked the challenge petitioners made to EPA's adoption of filtration as the model technology for the industry. *Id.* Petitioners demonstrated that while the industry uses this technology, it cannot achieve the promulgated effluent limitations. The failure of the court to even address important arguments regulated parties make is not consistent with appropriate standards of judicial review.

If the level of review the court gave in this instance is sustained, the EPA will have the first—and final—say as to how regulated parties behave. This Court cannot allow the federal appellate courts to relax their judicial review responsibilities merely because the rulemaking record is complex and technical.

2. The Writ Should Issue to Correct the Fourth Circuit's Failure to Address the Lack of Opportunity for Notice and Comment

As set forth in the petition, the court also *ignored* the petitioners' argument that the EPA violated the notice and comment provisions of the Administrative Procedure Act in failing to give public notice of, and allow comment upon, certain changes EPA made in the lead concentration values and flow allowances it had promulgated. Petitioners also demonstrated that the industry was not provided with proper notice that the extensive data it had developed and submitted to EPA was going to be totally rejected by the Agency. Petition at 13. The failure of the Agency to comply with the notice and comment requirements is a profound error that goes to the heart of the administrative law process. The refusal of the court even to *acknowledge* petitioners' challenge on this issue is a serious matter, and undermines the right to meaningful judicial review of agency action.

The complexities that necessarily will attend future EPA rulemaking proceedings underscore the magnitude of the court's error in this regard. In the future, EPA rulemaking will become increasingly complicated as the Agency struggles to promulgate and revise technical standards for a wide variety of industries. The empirical data bases upon which these standards will be predicated will continue to expand. The notice and comment provisions of the Administrative Procedure Act will assume increasing significance as affected parties submit relevant data and comment upon the data that EPA is considering. Only through the dialogue between the EPA and affected industries—which the notice and comment requirements are calculated to ensure—will the Agency promulgate economically and technically feasible effluent limitations.

Because the notice and comment requirements in the future will become increasingly important, this Court must

ensure that these requirements are not weakened. To ignore notice and comment deficiencies in agency rulemaking, and to approve the action of the agency because the record is complex—as the court did in the proceeding below—is to endanger the ability of parties who are subject to federal regulations to challenge federal rulemaking.

V. CONCLUSION

For the foregoing reasons, and those set forth in Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, the instant petition for writ of certiorari should be granted.

Respectfully submitted,

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